

**SPECIAL CITY COUNCIL REMOTE MEETING
July 14, 2020 @ 5:00 P.M.
MINUTES**

The meeting was called to order at 5:00 p.m.

Council President LeBlanc announced, "This meeting is recorded by video and audio in accordance with state open meeting law. Consistent with the Governor's orders, suspending certain provisions of the open meeting law and banning gatherings of more than 25 people, this meeting will be conducted by remote participation to the greatest extent possible. The public may not physically attend this meeting, but every effort will be made to allow the public to view and listen to the meeting in real time. Persons who wish to do so are invited to view the meeting and you have the information that was on the posting. If you are calling in on a phone, you can press *9 to request to speak. If you are watching on a computer a device, there is a raised hand button that you can tap or press to request to speak. Please use either these options to be recognized to speak."

Council President LeBlanc stated in order for the City Council to go into executive session, the Council must adhere to Massachusetts General Laws. He stated that as Council President he declared that the July 14, 2020 special meeting of the City Council has been duly posted and has been called to order. The Council is now in open session, and there is a quorum present. Before the Council can vote to go into Executive Session, the purpose of the Executive Session must be stated: "I declare the purpose of the Executive Session as follows is to discuss litigation strategy in a legal matter; and to discuss this in an open meeting may have a detrimental effect on the litigating position of the City. I further declare that it is the intent of the Council will not reconvene into open session after the Executive Session but will adjourn the Special City Council meeting from that point. Motions to go into Executive Session are by roll call vote and require a majority vote of the Council. Therefore, he entertained a motion: That the City Council and its staff go into Executive Session to discuss strategy with respect to an update on ongoing litigation pursuant to MGL Ch. 30A, §21(a)(3)

MOTION: On a motion by Councilor Gilman, seconded by Councilor Holmgren, the City Council by ROLL CALL voted 8 in favor, 0 opposed, 1 absent (Cox) to call the City Council and City Council staff, to enter into Executive Session (in accordance with MGL Chapter 30A, §21(a) (3) to discuss litigation strategy with respect to a real estate matter.

The public portion of the meeting adjourned at 5:05 P.M. for the purpose of entering into Executive Session.

Respectfully submitted,

**Joanne M. Senos
City Clerk**

SPECIAL CITY COUNCIL MEETING

July 14, 2020 @ 5:00 p.m.

Remote Meeting

Present: Council President Steve LeBlanc; Vice Chair, Councilor Val Gilman; Councilor Melissa Cox; Councilor Jen Holmgren; Councilor John McCarthy, Councilor Scott Memhard; Councilor Sean Nolan, Councilor Jamie O'Hara; Councilor Barry Pett

Absent: None

City Council Staff: Joanne M. Senos, City Clerk

Administration: Chip Payson, General Counsel, Krisna Basu; Asst. General Counsel, Attorney Thomas Mullen

EXECUTIVE SESSION

Council President LeBlanc stated as follows: "I call the Executive Session of the City Council to order at 5:14 p.m. on July 14, 2020. We are conducting this executive session by remote participation. We have a full quorum present and for the record those in attendance include City Councilors, Val Gilman, Jen Holmgren, John McCarthy, Scott Memhard, Sean Nolan, Jamie O'Hara, Barry Pett, City Council staff, Joanne M. Senos, City Clerk, General Counsel Chip Payson, Asst. General Counsel, Krisna Basu, and Attorney Thomas Mullen. Further, I state for the record that this executive session was voted by roll call vote 8 in favor, 0 opposed, 1 absent (Cox) during an open remote session of the special July 14, 2020 Council meeting. I declare the purpose of this executive session as follows: we have convened into executive session to discuss litigation regarding the 116 East Main Street special council permit. As stated in the open session of the City Council, to discuss this in an open meeting may have a detrimental effect on the litigating position of the City. I further declare that it is the intent of the Council not to reconvene back into open session. Any and all motions made during executive session – including the motion to adjourn are by roll call vote. Any documents and other exhibits, such as photographs, recordings or maps used during this executive session, shall, along with the minutes, be part of the official record of the session. The minutes of any executive session, the notes, recordings or other materials used in preparation of such minutes and all documents and exhibits used at this session may be withheld from disclosure to the public in their entirety as long as publication may defeat the lawful purposes of the executive session, but no longer; and unless and until such time as a litigating position is no longer jeopardized by such disclosure, at which time they shall be disclosed unless the attorney-client privilege under Section 7 of said Chapter 4 applies."

Chip Payson, General Counsel, said that Attorney Mullen will give little bit of the basics about how this works. Asst. General Counsel, Krisna Basu and Attorney Thomas Mullen will give quick updates for upcoming dates in August and take council questions.

Attorney Mullen introduced himself to the City Council and said he was honored to assist Gloucester in a number of matters over the years including zoning cases. Attorney Mullen began with a short review of the basics of zoning litigation. When a disappointed applicant, such as Mr. Bevilacqua, appeals to the court he has to name the granting permitting authority as defendants. They are only defendants in their official capacity and the real defendant is always the City. No damages or other relief is ever sought from the individual members. No councilor ever needs to consult or bring his/her own lawyer. Second, is what the lawyers call DeNovo, which means the judge doesn't care what happened before at the subcommittee meeting or the city council hearing is irrelevant. The judge finds his own facts, and decides whether those facts could support the decision that was reached by the council. If he could he can sustain their decision and, if he thinks he can't, he can overturn it. While a special permit granting authority has considerable discretion, the decision has to be consistent with and granted in terms of the zoning ordinance. It is never enough that the ZBA, Planning Board or City Council do not like the project nor it is never enough that the people in the neighborhood speaks out against it. As a rule of thumb, judges just accept that the neighbors are against the project. The court would look in the legal standards set forth in the zoning ordinance and even the judge could in fact apply DE Novo and gave an example to the council. The judges do not want to hear witnesses make vague negative statements about quality of life. They want to hear evidence that is hard and quantifiable, which means the municipal's lawyer's job is to show the judge that finding the standards in the ordinance that is hard and quantifiable facts presented at trial could justify a denial of the special permit. Attorneys Payson, Basu and himself plans to defend the council's denial that Mr. Bevilacqua sought just by doing that. Attorney Mullen recounted the 4 special council permits sought by Mr. Bevilacqua and the standards in the zoning ordinance. They expect to offer evidence that this project is out of in keeping with the neighborhood character and what to do so in a way that is hard and quantifiable. They will be presenting that there is no project or building within 300 feet with more than 5 units and that this is an 8 unit project. Nearby properties have more space per dwelling and more lot area per dwelling than Mr. Bevilacqua wants for this project. They plan to have a resident of the neighborhood testify about the views being obscured and about the claustrophobic feeling she anticipates but frankly that is pretty limited use. They plan on arguing that the neighborhood could use more good restaurants more than it could use additional housing. They will have the former

Superintendent of Schools testify about the fiscal impact of the costs of educating the children they anticipate in that project, and they will contrast that with a much smaller tax revenue increase. He is going to focus on all of the reasons some of which are hard and quantifiable and why the council decision made sense under the terms of the ordinance.

Krisa Basu, Asst. General Counsel added that Attorney Mullen covered most of what the City's position and strategy in how they are handling this case. She informed the council as far as the deadlines will be on zoom because of COVID closing the courts. On August 3rd, the Judge will actually come and look at the property and the area. The trial itself will be that people can watch youtube but will be on zoom as far as the people testifying on August 4-6. As far as Mr. Mullen was saying they want to show to the court hard data that shows this piece of property is not what the zoning code asks the City to consider the lot area per unit and the open space per unit. Assessor Nancy Papows is going to give those figures, and she has reviewed all the property cards and has all of the dimensions of the buildings and measurements of how far they are from each other to show the court what the neighborhood character is. A resident across the street will talk briefly about Pilot's Hill the view from the street will be impacted by this large structure and the superintendent will talk about the fiscal impact.

Councilor Gilman said going back to the type of case this is and looking at these three factors, we are no longer bringing forward things like the influence factors of why i.e. she changed her vote when she heard when she heard information about density from a particular person and she said that in her comments so that is not supposed to be entered at all because the judge doesn't care about why councilors voted? Even if she was not influenced by all the people raising their hands, she was influenced by the requisite criteria that changed her mind that she heard from one of the people so this DeNovo approach disregards any of the rest of the requisite criteria that the councilors might have had, stated and noted in the minutes did they feel it had any? to this case? **Attorney Mullen** replied that she was right and it totally irrelevant. The other side wants to bring up the fact there was a subcommittee approval which was reversed by the full city council. They take a position and based on their interactions with the judge so far, he believed that and believed Attorney Basu also agreed, that the judge is with them on this that it is totally irrelevant. The only time they can bring in information about what is in the city council minds, ZBA or Planning Board is very limited. Basically, did money change hands, were you bribed, did you decide because what kind of deal this is discriminatory intent? There is no allegation of that and there is no reason the courts will allow any evidence of that kind. **Councilor Gilman** asked would this validate why Attorney Cohen, representing Mr. Bevilacqua, on the zoom call he did a couple of weeks ago said that he strongly wanted and requested all the minutes of their meetings. If she wasn't mistaken, it sounded like the judge wasn't going to accept that, and he was willing to accept additional information before the trial as of the discovery and was she correct with that comment. **Attorney Mullen** didn't remember what Attorney Cohen said and it is his understanding of the judge's ruling was that the judge was not going to rule any evidence in or out in advance of the trial. He wants to hear the trial progress, but he strongly suggested that this is a DeNovo proceeding. There is no occasion in absence of extraordinary circumstances such as bribery or discriminatory intent to look into the minds of the city councilors. He read that meaning that there is no way Attorney Cohen is going to get that meeting, and he would fight to keep it out. **Councilor Gilman** asked Attorney Mullen if he thought it weakens their case. **Attorney Mullen** thought it was irrelevant and it weakens their case only in two respects. One is that the subcommittee did vote in favor and the City Council didn't but didn't want to get into any explanations why that happened. It is just distracting. Second, it was his understanding that there was kind of a straw pole taken at that meeting and they had the best of intentions but he urged the Council not to do that again. It looks bad in the judge's eyes and it looks like your ceding your responsibility to the crowd. Make up your minds and make it clear of your decision on the basis of the facts before you and the terms of the ordinance.

Councilor LeBlanc added that they usually do straw polls for certain things but in the future they won't, and appreciated that information.

Councilor McCarthy asked Mr. Mullen does congestion in and near and the fact of limited access by vehicle in and out of East Gloucester, historical traffic and the beach use would this this play a role in him defending this? **Attorney Mullen** replied that the only way to bring up traffic is if you had a traffic expert and you are talking about a fair amount of money. Also, he was pretty sure it wouldn't go their way because you do not generate a lot traffic with these units of residences. The comparison here is not with a closed restaurant but a live successful restaurant would carry a lot more traffic than no and would do so at inconvenient hours. Attorney Basu added that the plaintiff in his application talked about there being less traffic in the proposal and they would fight to keep that as they do not have a traffic expert.

Councilor O'Hara asked that the resident witness at the night of the hearing that she did not reside across the street and she did now? **Attorney Basu** replied that she did not live there at the time of the hearing but her mother did and she actually grew up in that house. **Attorney Basu** will have her testify that she grew up there and her mother was living there at the time of the hearing. She lives there now and it is not that she was unfamiliar with it. They could try to raise that but it wouldn't be very successful

Councilor Membard commented that he thought that one of the effective presenters at the night of the hearing was their local friend and local attorney, Michael Faherty, who spoke to an issue about something comparable with a several

block radius beyond the square feet. No comparable density project of this type, there are others in the city and in East Gloucester nothing within the fiscal neighborhood of three, four or five blocks of this neighborhood. He felt that characterization was an important point by distinguishing what exists now and how this would be changed with this density of a project. It seems to be in tune in about the conversation earlier. **Attorney Mullen** added they would certainly want to make that point and these populous can make it very powerfully with specific numbers. He could not stress enough how often judges want to hear really hard facts like that because most of what they are offering in a case like this is kind of vague and Impressionistic.

Councilor Gilman asked why it was not a good idea that they prefer to not have any councilors attend the site visit? The Council is trying to show that they put their trust in the legal counsel and are representing them and that is a valid reason. **Attorney Mullen** replied that the legal answer is that you may. The practicable answer is that the judge doesn't want to be swayed one way or the other. For example, Attorney Basu and himself will be there. They are not allowed to speak other than that to point things out to the judge.

Councilor Pett commented that Councilor McCarthy nor he were not on the council at the time when the actions were taken, etc. Is there anything they need to do or be aware of either coming forward from the judge at this time or any other time as part of the process up to this point? Attorney Mullen replied no. They would not be called upon nor any of the councilors be called upon to do anything in connection with this case. **Attorney Mullen** informed the council that he previously litigated this issue, in fact representing Gloucester four years ago, where the other side tried to force members of the ZBA to testify in depositions.

He argued that this is irrelevant and the same judge that they are before him now agreed with him forbade the other side from deposing any of the decision makers. **Attorney Basu** added that any way the city council would be involved was that if the judge made a decision that the council look at this again.

Councilor O'Hara asked how long will the judge take to issue his decision? Based on what he had heard here this evening they seemed to be on pretty solid ground based on the decisions in relation to the ordinance. **Attorney Mullen** replied to Councilor O'Hara's question. He could only speculate that it may take a month or two, and he has also waited a year for a judge to issue his decision. **Attorney Basu** added that she had a conversation with the stenographer today relayed the timeline for the decision. **Attorney Mullen** added to Councilor O'Hara's question about the merits and strength of the case, Attorney Basu and himself are optimistic for the reasons they discussed.

MOTION: On a motion by Councilor Pett, seconded by Councilor Holmgren, the City Council voted by ROLL CALL 9 in favor, 0 opposed to adjourn the Executive Session and close the Special City Council Meeting @ 5:50 p.m. on July 14, 2020.

Respectfully submitted,

Joanne M. Senos
City Clerk